APPEAL NO. 020873
FILED MAY 20, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on February 6, 2002, with the record closing on March 22, 2002. With regard to the six disputed issues, the hearing officer determined (1) that the deceased did not suffer a compensable injury in the form of an occupational disease; (2) that because the deceased did not have a compensable injury, he did not have disability; (3) that the date of injury pursuant to Section 408.007 is _____; (4) that the deceased timely reported his alleged on-the-job injury to the employer pursuant to Section 409.001 and therefore the respondent/cross-appellant (carrier) is not relieved of liability pursuant to Section 409.002; (5) that the deceased timely filed a claim within one year of the date of injury; and (6) that the carrier timely contested compensability pursuant to Section 409.021.

The appellant/cross-respondent (claimant/beneficiary) appealed the issues of compensable injury, disability, and the carrier's timely contest of compensability, basically on a sufficiency of the evidence basis. The carrier appealed the issues of date of injury (alleging an earlier date of injury), timely reporting of the injury to the employer, and timely filing of the claim. The carrier responds to the claimant/beneficiary's appeal, generally asserting that it recites "facts" which were not in evidence, and specifically urges affirmance on issues in its favor. The claimant/beneficiary responds that "Carrier failed to timely file its Response and Request for Review"; that the date of injury should be affirmed; and otherwise reasserts points of the appeal. So much of the claimant/beneficiary's response that constitutes an appeal of various aspects of the hearing officer's decision will be considered as being timely as a response, but untimely filed as an appeal.

DECISION

Affirmed.

Regarding the claimant/beneficiary's allegation that the carrier's response and request for review were not timely filed, we hold that those pleadings were timely filed within 15 days, excluding Saturdays, Sundays, and holidays listed in the Texas Government Code, applying Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(d) (Rule 102.5(d)) and Section 410.202.

The Appeals Panel does not generally consider evidence submitted for the first time on appeal. So much of the claimant/beneficiary's appeal that constitutes "facts" not in evidence at the CCH will not be considered on appeal.

Much of the evidence was in conflict. The deceased was employed by a specialty trade contractor specializing in concrete cutting (employer) in various capacities for 25 years or so. It is undisputed that initially the deceased was employed as an operator in the field, cutting concrete, but that some time around 1981, he was employed as a dispatcher

and as an inside and outside salesman. While it is undisputed that the deceased did some concrete cutting as a dispatcher/salesman, the extent of the concrete cutting is seriously disputed. Also disputed is whether the deceased did more dry cutting (as the claimant/beneficiary contends) or more wet cutting (as the carrier contends) and the amount of particulate matter in the air when doing the cutting. Undisputed is that some time in 1995 or early 1996, while away from work, the deceased began exhibiting shortness of breath. The deceased began seeing a number of doctors and had a lung transplant in April 1997. The deceased developed complications and died on _____.

## INJURY AND DISABILITY ISSUES

Section 401.011(34) defines an "occupational disease" as a disease arising out of and in the course and scope of employment that causes damage or harm to the physical structure of the body, including a repetitive trauma injury. The term includes a disease or infection that naturally results from the work-related disease. The term does not include an ordinary disease of life to which the general public is exposed outside of employment, unless that disease is an incident to a compensable injury or occupational disease. Since the causal connection between the claimed injury and the employment in this case is not a matter of common knowledge, the determination of compensability must be established by a reasonable medical probability. Schaefer v. Texas Employers' Insurance Association, 612 S.W.2d 199 (Tex. 1980).

The medical evidence was in conflict. Basically, four doctors (one of whom is a Ph.D. toxicologist) support the claimant/beneficiary's position that the deceased's death was causally related to his employment, although on different theories. One theory was that the deceased's "end stage fibrosis is due to hard metal pnuemoconiosis as a result of occupational exposure" (hard metal disease); the other theory is that the deceased had silicosis. The carrier's two experts, a board certified "anatomic pathologist" and a board certified "medical toxicologist" testified that the deceased did not show a pattern of hard metal disease and that the deceased had idiopathic pulmonary fibrosis of an unknown and nonoccupational origin. With the evidence in conflict, it was within the province of the hearing officer, as the sole judge of the weight and credibility of the evidence (Section 410.165(a)) to resolve the conflicts in the evidence and determine what facts have been established from the conflicting evidence. St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). This is equally true of medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so on this issue. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Because we affirm the hearing officer's determination that the deceased did not sustain a compensable occupational disease injury, the deceased cannot, by definition in Section 401.011(16), have disability.

## DATE OF INJURY, TIMELY NOTICE TO THE EMPLOYER, AND TIMELY FILING OF THE CLAIM

Section 408.007 provides that the date of injury for an occupational disease is the date on which the employee knew or should have known that the disease may be related to the employment. Sections 409.001 and 409.002 provide that an employee must report the alleged occupational disease to the employer within 30 days from the date he knew or should have known that the disease may be related to the employment and, pursuant to Section 409.004, must file a claim for compensation with the Texas Workers' Compensation Commission (Commission) within one year from the date he knew or should have known that the disease may be related to the employment.

We agree with the carrier that the date of an occupational disease injury "is an imprecise concept." We have generally followed the concept as being the date that a reasonable person could have been expected to understand the nature, seriousness, and work-related nature of the disease. Commercial Insurance Company of Newark, New Jersey v. Smith, 596 S.W.2d 661 (Tex. Civ. App.-Fort Worth 1980, writ ref'd n.r.e.). The carrier alleges that date to be on or about February 28, 1996, when the deceased was seen on referral from his family doctor by Dr. P, who performed a bronchoscopy. In his operative report of that date, Dr. P notes the deceased's "past history of cigarette smoking" and "significant occupational exposure to dust from cutting cement" and comments:

> I discussed with [the deceased] the possible etiologies and explained that prior to any treatment, bronchoscopy would be indicated to rule out other possible etiologies.

Dr. P's postoperative diagnosis included a diffusely abnormal chest radiography, "rule out possible infectious etiology," possible occupational etiology, "other granulomatous or other etiology." The hearing officer commented that Dr. P's "working diagnosis was idiopathic pulmonary fibrosis of unknown etiology." Subsequent reports dated March 2, March 14, April 19, and June 4, 1996, do not give any diagnosis. Dr. P then referred the deceased to another doctor.

The carrier also alleges that Ms. H, employer's owner and president, gave the deceased documentation entitled "Preventing Silicosis and Deaths in Construction Workers" which would have alerted a reasonable person to understand his lung condition may be related to his employment. However, that literature also caused Ms. H to have air studies done which showed that the workplace met OSHA standards, which the hearing officer could find negated any warning the documents may have given the deceased.

The claimant/beneficiary alleges that the deceased first realized that his condition may be work related when the deceased was told on _____, by Dr. PC that he had end stage fibrosis due to hard metal pneumoconiosis as a result of occupational exposure to hard metal dust. The hearing officer's determination that the deceased's date of injury

was _____, is supported by the evidence and is not against the great weight and preponderance of the evidence.

It is undisputed that the deceased reported a work-related injury to the employer on January 7, 2000, and filed his Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41) with the Commission on February 14, 2000. Because we are affirming a _____, date of injury, the deceased timely reported his alleged injury within 30 days of the date of injury and timely filed his claim with the Commission within one year of the date of injury.

**CARRIER'S TIMELY CONTEST OF COMPENSABILITY**

Section 409.021(a) provides that the carrier shall initiate compensation not later than the seventh day after the date on which the carrier receives written notice of the injury or notify the Commission and the employee (in this case, the claimant/beneficiary) in writing of its refusal to pay. In this case, it is undisputed that the deceased gave notice to the employer on January 7, 2000. Although there is some evidence that there may have been verbal notice to the carrier before January 12, 2000, there is no evidence that the carrier received the first written notice earlier than January 12, 2000. The carrier filed its Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) on January 19, 2000, which met the requirements of Section 409.021(a). The claimant/beneficiary's appeal on this ground is without merit.

There was conflicting evidence presented at the hearing on all of the issues. The hearing officer weighed the credibility and inconsistencies in the evidence and the hearing officer's determination on the issues is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra*.

Accordingly, the decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **AMERISURE MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CINDY GHALIBAF**
**7610 STEMMONS FREEWAY, SUITE 350**
**DALLAS, TEXAS 75247**.

Thomas A. Knapp
Appeals Judge

CONCUR:

Michael B. McShane
Appeals Judge

Roy L. Warren
Appeals Judge